Resource Guide for Managing Capital Cases

Volume II: Habeas Corpus Review of Capital Convictions

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Contents

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I. Introduction

This is the second part of a two-volume resource guide for managing capital cases in the federal courts. The first volume covers federal death penalty trials. This volume covers management of cases involving federal habeas corpus review of state and federal capital convictions. This volume is meant to assist judges and court staff by providing a summary of relevant law and case-management procedures used by the federal courts in these cases.

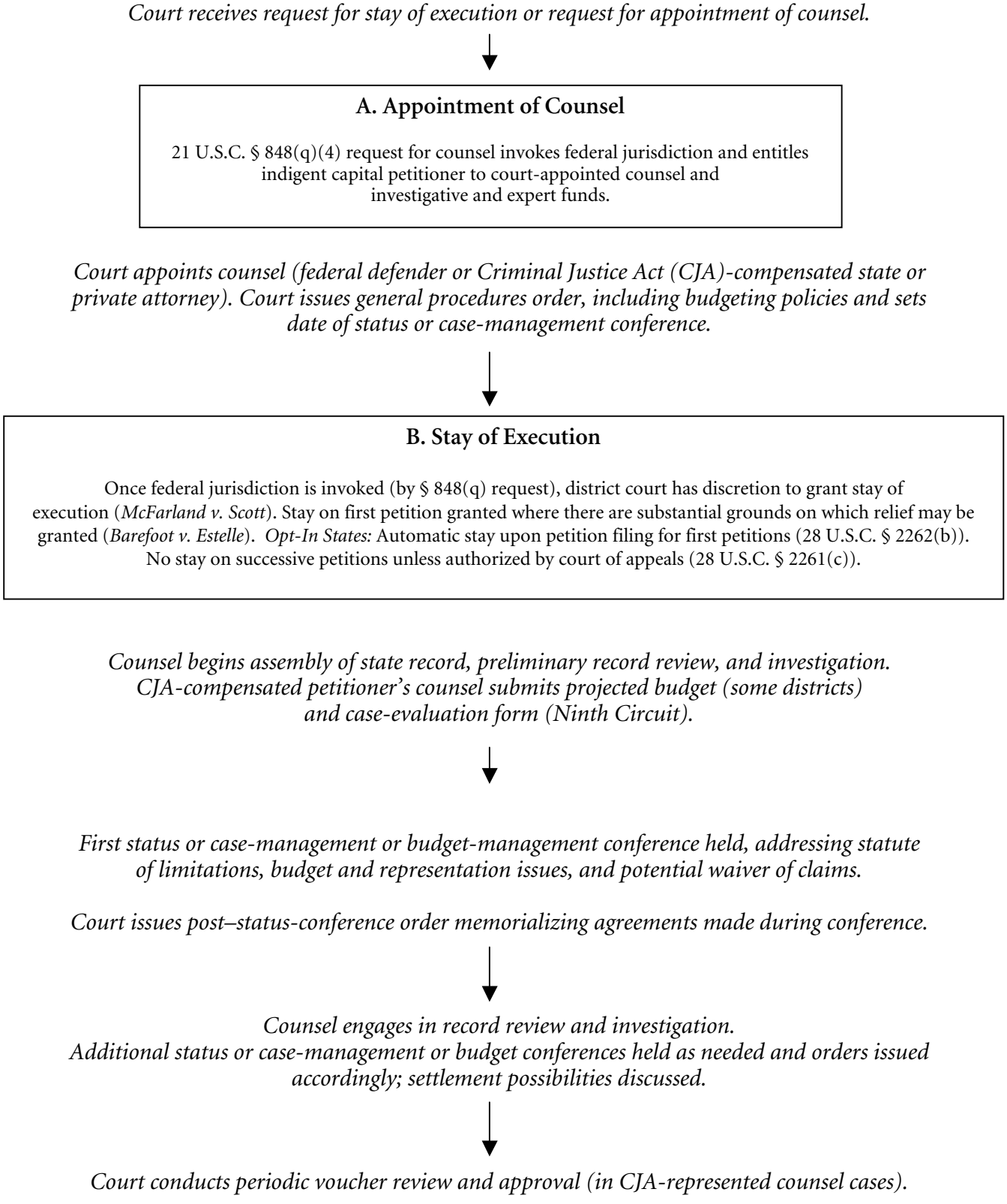
Section II, "Management of Individual Capital Habeas Cases," summarizes the substantive law of federal habeas corpus that has an impact on case management and procedure (such as jurisdiction to appoint counsel, statutes of limitations, and evidentiary hearings) and describes various techniques judges have used to manage individual cases. Section III, "District-Wide and Circuit-Wide Approaches to Capital Habeas Corpus Case Management," describes several practices used in the federal courts to monitor and streamline capital case management at a district- or circuit-wide level. These include formalized case-management plans, standardized budgeting and voucher review, standing capital case committees, capital case tracking and status reports, death penalty law clerks, budgeting oversight, and state–federal joint educational and planning efforts. The appendices include case-management plans, budgeting forms, and sample orders from several districts that illustrate these approaches in practice.

This guide is based on a variety of sources: substantive legal research of federal habeas corpus law; inquiries to federal judges, court and chambers staff, and defenders offices around the country; various court publications (national and local), including guidelines for capital cases, court budgeting, and case-management statistics; and court documents supplied by death penalty law clerks of several courts. The guide discusses the substantive law of habeas corpus only as it affects case-management issues. Appendix F provides a list of resources that more fully discuss substantive habeas corpus law.

The guide's examples of case-management approaches are illustrative rather than prescriptive.

Below is a generalized overview of the flow of a typical capital habeas corpus case in the federal courts, with reference to some key substantive legal issues. The text in italics indicates activity happening inside the court, or by counsel. The text inside boxes refers to relevant law applicable at each stage. This overview does not include all law or procedures. Court procedures in individual cases may follow only some parts of this overview or may proceed in a different order.

Figure 1: Capital Habeas Corpus Flow Chart



Petition Filed

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Court begins review of claims, with special attention to procedural issues (e.g., timeliness, exhaustion).

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Discovery undertaken if authorized by the court.

Parties meet and confer re: exhausted claims (Ninth Circuit).

C. Timely Filing?

Petition must be filed within one year (28 U.S.C. § 2244(d)(1); 28 U.S.C. § 2255).
Equitable tolling of limitations period? (*Duncan v. Walker*, Souter & Stevens concurrences)
Opt-In States: Petition must be filed within 180 days (28 U.S.C. § 2263(a)).

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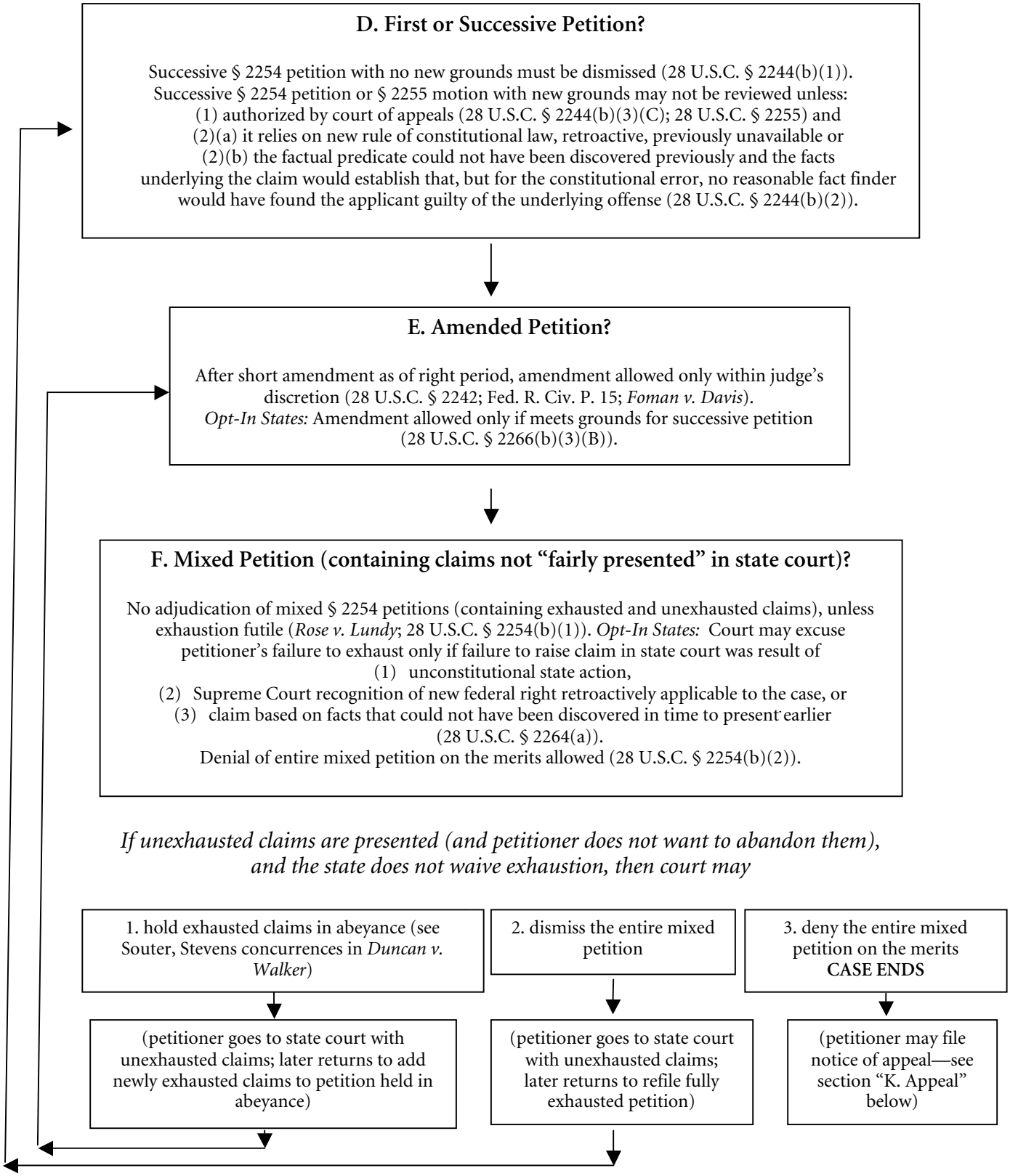
D. First or Successive Petition?
Successive § 2254 petition with no new grounds must be dismissed (28 U.S.C. § 2244(b)(1)).
Successive § 2254 petition or § 2255 motion with new grounds may not be reviewed unless:
(1) authorized by court of appeals (28 U.S.C. § 2244(b)(3)(C); 28 U.S.C. § 2255) and
(2)(a) it relies on new rule of constitutional law, retroactive, previously unavailable or
(2)(b) the factual predicate could not have been discovered previously and the facts underlying the claim would establish that, but for the constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense (28 U.S.C. § 2244(b)(2)).
E. Amended Petition?
After short amendment as of right period, amendment allowed only within judge's discretion (28 U.S.C. § 2242; Fed. R. Civ. P. 15; Foman v. Davis).
Opt-In States: Amendment allowed only if meets grounds for successive petition (28 U.S.C. § 2266(b)(3)(B)).
F. Mixed Petition (containing claims not "fairly presented" in state court)?
No adjudication of mixed § 2254 petitions (containing exhausted and unexhausted claims), unless exhaustion futile (Rose v. Lundy; 28 U.S.C. § 2254(b)(1)). Opt-In States: Court may excuse petitioner's failure to exhaust only if failure to raise claim in state court was result of
(1) unconstitutional state action,
(2) Supreme Court recognition of new federal right retroactively applicable to the case, or
(3) claim based on facts that could not have been discovered in time to present earlier (28 U.S.C. § 2264(a)).
Denial of entire mixed petition on the merits allowed (28 U.S.C. § 2254(b)(2)).
If unexhausted claims are presented (and petitioner does not want to abandon them), and the state does not waive exhaustion, then court may
1. hold exhausted claims in abeyance (see Souter, Stevens concurrences in Duncan v. Walker)
2. dismiss the entire mixed petition
3. deny the entire mixed petition on the merits CASE ENDS
(petitioner goes to state court with unexhausted claims; later returns to add newly exhausted claims to petition held in abeyance)
(petitioner goes to state court with unexhausted claims; later returns to refile fully exhausted petition)
(petitioner may file notice of appeal—see section "K. Appeal" below)

With no unexhausted claims, court continues to review petition.

Answer Filed
(usually 30–60 days after petition filing)

Reply, Traverse Filed
(usually 30–60 days after preceding filing)

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Court reviews claims for procedural default.

G. Procedurally Defaulted Claims?

(Has a claim in § 2254 petition been denied by state procedural rule that is an adequate and independent state ground?)
No federal review unless cause and prejudice or miscarriage of justice
(*Wainwright v. Sykes*; *Coleman v. Thompson*).

(Potential) Motion for Evidentiary Hearing Filed

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H. Evidentiary Hearing Warranted?

No evidentiary hearing in § 2254 cases on claim for which petitioner failed to develop factual basis in state court (*Williams v. Taylor*) unless claim relies on
• new rule of constitutional law, retroactive, previously unavailable or
• factual predicate that could not have been discovered previously, and
(in addition to one of the above)
• the facts underlying the claim establish that, but for the constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense
(28 U.S.C. § 2254(e)(2)).

↙ ↘

If court grants motion for evidentiary hearing:
Court issues evidentiary hearing procedures order and sets case-management conference to address issues to be covered in evidentiary hearing.
Counsel conducts additional discovery for evidentiary hearing, as approved by court.

Evidentiary Hearing Held (rare in most districts)

Court considers evidence presented at hearing in consideration of petitioner's claims.

If court denies motion for evidentiary hearing:

Court issues denial order.

Counsel submits additional briefing as requested by the Court.

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Court reviews any remaining ripe claims on the merits.

I. Is Habeas Corpus Relief Appropriate?

No § 2254 relief unless state adjudication resulted in decision that was either:
• contrary to or unreasonable application of clear federal law, or
• based on unreasonable determination of the facts in light of evidence at state proceeding
(28 U.S.C. § 2254(d)).

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Court issues order granting or denying habeas corpus relief.

J. Deadlines for Court Ruling

Opt-In States: Court must issue final ruling within 180 days of petition filing (28 U.S.C. § 2266(b)).

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Court issues order setting deadlines for post-judgment motions.

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If writ denied, petitioner files notice of appeal, requests certificate of appealability in district court.

K. Appeal

No appeal allowed without certificate of appealability granted by "circuit justice or judge" (28 U.S.C. § 2253).

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District court issues certificate of appealability or states reason for denial of request (if denied in district court, certificate can be sought in the court of appeals).

District court's denial of habeas corpus relief is presented on appeal to court of appeals.

Court of appeals sets deadlines for briefing, issues orders accordingly, and issues final ruling.

Deadlines for Court Ruling

Opt-In States: Court of appeals must make final determination of appeal within 120 days after reply is due or answer filed (28 U.S.C. § 2266(b)).

II. Management of Individual Capital Habeas Cases

Capital habeas corpus law has grown in complexity and volume since 1976 when the Supreme Court affirmed the constitutionality of the death penalty.[1] Changes in case law and legislation, including the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), directly affect federal judges' case-management practices in these cases. This section provides a brief summary of those aspects of substantive law that affect case management, in the general order of their appearance in a court undertaking federal habeas corpus review, and describes how different judges have implemented that law in individual cases.

Petitions for capital habeas review primarily arise under 28 U.S.C. § 2254,[2] which authorizes federal review of anyone in state custody "in violation of the Constitution or laws or treaties of the United States." A much smaller percentage of capital habeas cases arise under section 2255, which provides for habeas relief for federal prisoners. Unless otherwise noted, this guide focuses on petitions from state prisoners under section 2254.

The most common method of capital case management is the creation and use of standard orders, especially in the initial phases of litigation where events are rather predictable and standardized information about court procedures must be conveyed to the parties. Many district courts have developed standard orders, which an individual judge can then tailor to the needs of a specific case. Even if a judge does not use a standard order, the general flow of events is relatively predictable, particularly in the early stages of litigation.

A judge will normally issue an appointment-of-counsel order early in the case (see section II.A, below). Shortly thereafter (and sometimes in the same counsel-appointment order), the judge issues an order conveying the relevant procedures and policies for capital habeas corpus litigation in that jurisdiction, or the judge implements his or her own procedures for managing such cases. This order might include matters such as what the judge expects of counsel in preparation for and during scheduling and status conferences (e.g., obtaining and reviewing the record), and filing rules and what supporting documentation is required. If the judge has appointed counsel under the Criminal Justice Act (CJA),[3] then this order might include details on budgeting and voucher submission, such as hourly rates, a list of reimbursable expenses, budget preparation requirements, and standards for requesting investigative and expert expenses.

Some "general procedure" orders are very detailed, including substantive law bases for the rules and procedures mentioned. Appendix B contains examples of general procedure orders in capital habeas cases.

After these initial orders, a judge usually follows with a scheduling order containing deadlines for upcoming events, such as the filing of the petition, response, reply, requests for discovery, and motion for evidentiary hearing, as well as the date by which the state

1. This began with *Gregg v. Georgia*, 428 U.S. 153 (1976), after four years of unconstitutionality under *Furman v. Georgia*, 408 U.S. 238 (1972).

2. Unless otherwise noted, all statutory references are to Title 28 of the United States Code.

3. 18 U.S.C. § 3006A (West 2004).

must give the original record to the petitioner's counsel.[4] Judges who hold status conferences often issue post–status-conference orders memorializing the details of what the parties and the judge agreed on during that conference.[5] Finally, if the judge has granted a motion for an evidentiary hearing, he or she usually issues a basic order setting forth relevant deadlines (for discovery, for requesting additional funds) and the preparation required before the hearing (such as a list of witnesses, a statement of disputed and undisputed facts, exhibits, and a trial brief).[6]

Some judges have magistrate judges assist in these initial stages of capital case management, either under district policy or on a case-by-case basis.[7] Many magistrate judges handle the counsel appointment and scheduling orders before referring the case back to a district judge;[8] others continue through a good part of the life of the case, responding to procedural motions and managing the case by monitoring budgets and holding status conferences.

The following subsections describe relevant law and more specific case-management approaches for various stages of capital habeas litigation.

A. Appointment and Compensation of Counsel

1. Requests for Counsel and Related Services; Applicable Law and Practice

Even before a capital habeas petition is filed, a petitioner will likely file a request for court-appointed counsel. Although there is no constitutional right to counsel in habeas corpus proceedings,[9] 21 U.S.C. § 848(q)(4)(B) entitles an indigent petitioner who has been sentenced to death to the appointment of one or more attorneys, at least one of whom must meet the experience requirements in that section.[10] In *McFarland v. Scott*, 512 U.S. 849 (1994), the Supreme Court held that because section 848(q) creates a statutory right to counsel for capital habeas corpus petitioners, a judge should appoint such counsel before the petition is filed, so counsel can assist in the petition's preparation.

Appointed federal habeas corpus attorneys periodically submit vouchers for payment, and the judge or another court staff member reviews the vouchers. Attorneys' fees are capped at a rate of $125 per hour by 21 U.S.C. § 848(q)(10).[11]

Under 21 U.S.C. § 848(q)(9), a judge has discretion regarding whether to authorize funds for expert, investigative, and other services. The judge may not authorize such funds *nunc pro tunc*, and the statute also prohibits ex parte authorization without "a proper showing [of . . .] the need for confidentiality." Section 848(q)(10) caps investiga-

4. For examples from the Eastern District of Missouri and the Western District of Oklahoma, see Appendices D-1 and D-4, respectively.

5. *See, e.g.*, Appendix D-4 (Post-Status Conference Scheduling Order and Termination of Referral to Magistrate Judge—Western District of Oklahoma).

6. *See, e.g.*, Appendix E-3 (Evidentiary Hearing Scheduling Order—Central District of California).

7. *See, e.g.*, Appendix D-3 (Referral to Magistrate Judge—Western District of Oklahoma).

8. *See, e.g.*, Appendix D-4 (Post-Status Conference Scheduling Order and Termination of Referral to Magistrate Judge—Western District of Oklahoma).

9. *Murray v. Giarratano*, 492 U.S. 1 (1989).

10. 21 U.S.C. § 848(q)(4)(B)(5), (6) (West 2004).

11. See *infra* sections II.A.2 and III.B for more information on budgeting and cost control.

tive and expert fees at a total of $7,500 unless the judge certifies a greater amount and the chief judge of the circuit approves.

Judges have sometimes found it difficult to locate qualified private attorneys for capital habeas cases, and some legislators and members of the public have criticized high payments made to CJA attorneys in certain areas. Federal judges and administrators have adopted creative and flexible approaches to capital counsel appointment, several of which are described below. A judge might find that one of the following approaches to counsel appointment is already in place in his or her district; if not, the judge might be able to adopt one of these approaches for use in a particular case.

a. Appointing federal counsel to work with state-appointed counsel in cases where exhaustion is necessary. In state habeas (section 2254) cases, the law is not clear as to whether federally compensated counsel may appear in state court for the petitioner when claims are returned for exhaustion.[12] Section 848(q) of Title 21 and 28 U.S.C. § 2254 contemplate that federally appointed counsel will represent a petitioner through the federal habeas corpus case "and any subsequent proceedings." Arguably, returning to state court to exhaust claims falls under these "subsequent proceedings," but most federal courts have been unwilling to pay counsel for state exhaustion appearances.[13] To avoid this problem, judges in some cases have appointed a CJA attorney to the case and had that attorney work with another state-appointed attorney, but this is not feasible in all cases and also relies on the state's counsel-appointment and compensation apparatus.

b. Appointing state post-conviction counsel as federal habeas corpus counsel. In some districts, the state post-conviction attorneys are available to continue representation during federal habeas corpus proceedings, and judges might appoint the attorneys under the CJA for those proceedings. The quality of such counsel, of course, depends in part on the state's program for post-conviction appointment, but there are significant benefits to having state attorneys continue their representation in federal court. First, the attorneys are already well acquainted with the cases, thus reducing the time (and expense) necessary to research the record and file the federal habeas corpus petitions. In cases in which a judge is able to appoint state counsel, there are rarely any unexhausted claims filed in the federal habeas corpus petition, thus minimizing the need to suspend cases for state exhaustion proceedings (and the accompanying question of funding for representation in state court). Moreover, if state exhaustion is ever necessary, there likely will be no question over the propriety of federal counsel appearing in state court if, also being attorney of record in state court, counsel is paid by state funds to conduct exhaustion proceedings as well as the initial post-conviction litigation.

c. Appointing counsel from capital units in federal defender offices. Several federal and community defender offices accept appointment to capital habeas corpus cases, and some even have dedicated capital units. Appointing these attorneys in lieu of private attorneys on CJA funding not only generally ensures well-qualified counsel but also avoids the administrative complications of CJA-appointed counsel (e.g., budgeting expenses and voucher review). Some judges, either pursuant to district policy or in an individual case,

12. See *infra* section II.F for a discussion of exhaustion requirements.
13. See *infra* section II.F.2 for more detail.

combine the use of federal defenders and appointed counsel. For example, in the Eastern District of California judges often team an attorney from the federal capital habeas unit with a CJA-appointed attorney, such as the state post-conviction attorney. Not all judges find a combined approach to be efficient, however, and the usefulness of this approach will depend on the compatibility of each counsel.

In the Central District of California, district judges first appoint a federal defender to the case and only use the panel of CJA attorneys if the federal defender is unable to take the case. Even as second chair, CJA attorneys may not be appointed in the Central District of California unless the case is sent back to state court for exhaustion and the federal defender is unavailable to provide representation in state court. In contrast, in the Eastern District of Tennessee, judges normally appoint CJA private attorneys initially and appoint the federal defender as co-counsel if necessary.

d. Appointing counsel from state-funded capital representation centers. State-funded or privately funded offices for capital defense representation exist in some states, such as the Office of Capital Collateral Representation in Florida, the Arizona Capital Representation Project, the California Habeas Corpus Resource Center, and South Carolina's Center for Capital Litigation. Federal judges in these states often appoint lawyers from these offices as counsel in federal habeas corpus cases and compensate them for their work through CJA vouchers. As these attorneys are also funded by state and private resources, there is no funding dilemma for the federal courts if counsel must later return to state court for exhaustion or other proceedings.

The state-funded centers generally cannot handle all petitioners in need of counsel; private attorneys or federal defender units often need to provide some representation in each district. Most state capital representation centers, therefore, also offer assistance to private CJA attorneys if needed.

e. Appointment of federal counsel contemporaneous with state post-conviction proceedings. In the District of Maryland, the federal district court appoints federal habeas corpus counsel at the same time the petitioner begins *state* post-conviction proceedings. CJA funds compensate these attorneys for all research, undertaken during these state proceedings, that constitutes "federal research"—that is, research for claims that will eventually be filed in the federal habeas corpus petition but not including the detailed development of claims for state litigation. In other words, the federal work is "carved out" of the representation necessary for state post-conviction proceedings and compensated by the federal court well in advance of any filings in federal court. The rationale behind this approach is that federal habeas corpus counsel will be well acquainted with the claims by the time of federal filing, thereby reducing federal time and cost, as well as minimizing the likelihood of unexhausted claims appearing in the federal petition. When exhaustion is necessary, the exhaustion representation dilemma is avoided because the state public defender (who conducts the state post-conviction representation) generally maintains a connection to the case during federal proceedings by serving on a consulting basis as needed and is thus immediately positioned to appear in state court.

In Maryland, the district's CJA supervising attorney, who also is charged with voucher review,[14] oversees this approach. The state public defender alerts the CJA supervising attorney when a prisoner sentenced to death will begin post-conviction proceedings and helps identify a CJA attorney to appoint. One judge who is responsible for CJA budgeting for the district further supervises counsel appointment and payment. (Jurisdiction for the federal courts is established by a request from the prisoner asserting a *McFarland* right to federal habeas corpus counsel.)[15] The case is given a civil miscellaneous number, and the supervising judge monitors it until a federal petition is filed, at which time the case is randomly sent to a judge for permanent assignment. During all these proceedings, the federal judge asks appointed counsel to submit a budget and vouchers under standard CJA compensation procedures and reviews them for compliance with the budget. The CJA supervising attorney or the judge holds a meeting with counsel to work out the budget (adjustments to the budget are allowed as needed).

Although the District of Maryland has standardized this counsel-appointment procedure and has additional court staff available to implement it, other districts or judges could adopt a similar approach, keeping in mind any potential local objections to the appointment of federal counsel prior to the completion of state proceedings.

2. Budgeting and Voucher Review

In capital habeas corpus cases where the petitioner is represented by private counsel compensated by CJA vouchers, the judge's case-management responsibilities include the review and approval of expenses submitted in these vouchers. Some judges choose to review the vouchers themselves, while others use death penalty law clerks[16] or other court staff to conduct such review. In a few districts, staff members are designated specifically for reviewing CJA vouchers.[17]

Many judges require the CJA attorneys appearing before them to submit case budgets prior to voucher submission. After the judge has approved a final budget, the judge or designated staff member then reviews submitted vouchers for consistency with the approved budget. Some courts have regularized this practice through standard budgeting orders.[18]

B. Stay of Execution

Inmates often submit pre-petition requests for stays of execution, either along with or shortly before or after submitting a request for court-appointed counsel. A judge need not wait for a petition to be filed in order to grant a stay of execution. In *McFarland v. Scott*, 512 U.S. 849 (1994), the Supreme Court held that once a petitioner has invoked the 21

14. This position was one of the pilot positions funded along with CJA supervising attorneys in the Northern and Central Districts of California. See *infra* section III.B.2 for details.

15. McFarland v. Scott, 512 U.S. 849 (1994) (holding federal jurisdiction begins upon request for counsel and petitioner invokes right to habeas representation).

16. *See infra* section III.D.

17. *See infra* section III.B.2.

18. *See infra* section III.B.1.

U.S.C. § 848(q) right to habeas corpus counsel, federal jurisdiction exists and the judge has the power to grant a stay.

Section 2251 authorizes a federal judge to stay execution of state judgments, but does not specify the standards that govern review of stay petitions. In *Barefoot v. Estelle*, 463 U.S. 880 (1983), the Supreme Court held that such stays should be granted in capital habeas corpus cases when necessary to permit consideration of the merits and when there are "substantial grounds upon which relief might be granted." Later, in *Lonchar v. Thomas*, 517 U.S. 314 (1996), the Court explained that where a petitioner presents to a district judge a request for a stay on a first petition and the judge cannot dismiss the petition on the merits before the scheduled execution, the judge should issue a stay and address the merits to prevent the case from becoming moot.

In cases involving states that the judge finds meet certain statutory counsel representation and compensation requirements ("opt-in" states), the judge must issue an automatic stay upon the filing of a first petition (section 2262(b)), and issue no stays for successive petitions unless the court of appeals has authorized the filing of a successive petition (section 2261(c)). See Table 1 *infra* section II.C.1 for details.

Many district courts' local rules provide for a stay of execution upon the filing of a request for counsel, and many have standard orders for such instances. For examples of stay orders, see Appendix B.

Most federal courts of appeal have rules providing for a stay of execution pending determination of the appeal.[19] In addition, Federal Rule of Appellate Procedure 41(d)(2) allows a party to move for a ninety-day stay pending the filing of a petition for certiorari to the U.S. Supreme Court (showing that the petition presents a substantial question and that there is good cause for a stay). The ninety days is extendable for good cause or, if a stay is obtained, until the Supreme Court's final disposition. Fed. R. App. P. 41(d).

C. Petition Filing Deadlines; Expedited Procedures for "Opt-In" States

Under section 2244(d)(1) (applicable to habeas corpus cases arising from state convictions) and section 2255 (applicable to those arising from federal convictions), the first petition must be filed within one year of the date on which (1) the judgment of conviction became final (the most common situation); (2) an impediment to filing, created by the state or federal government, was removed; (3) the Supreme Court recognized the right asserted and made it retroactively applicable to cases on collateral review; or (4) the factual predicate of the claim could have been discovered by due diligence. Section 2244(d)(2) tolls the one-year limitations period for section 2254 cases while a "properly filed" petition is "pending" on "state post-conviction or other collateral review." The Supreme Court has held that this tolling period includes the time between a lower state court's decision and the filing of a notice of appeal to a higher state court,[20] but there are

19. *See, e.g.,* Fourth Circuit Rule 22(b)(3); Seventh Circuit Rule 22(h)(1); Ninth Circuit Rule 22-4, 22-5.

20. Carey v. Saffold, 536 U.S. 214 (2002) (noting that otherwise a statutory anomaly would result where federal courts have to "contend with habeas petitions that are in one sense unlawful (because the claims have not been exhausted) but in another sense required by law (because they would otherwise be barred by the 1-year statute of limitations)").

many other issues surrounding tolling (such as the meaning of "pendency" and "proper filing") on which the courts of appeals have reached different conclusions. For federal inmates who do not file a petition for certiorari with the Supreme Court on direct review, the Court has held that section 2255's one-year limitation period starts to run when the time for seeking such review expires.[21]

Two situations, both of which occur only in section 2254 cases, can complicate the determination of petition filing deadlines: (1) the state argues that it is in compliance with statutory criteria for expedited processing of a capital habeas petition; and (2) the petitioner files a "mixed" petition that includes both exhausted and unexhausted claims.

1. Expedited Procedures for "Opt-In" States

Chapter 154 of Title 28, created by the AEDPA, provides expedited procedures for section 2254 capital habeas corpus petitions in states that "opt-in" to the chapter by meeting detailed counsel-representation and compensation requirements. Table 1 describes the opt-in requirements and lists the aspects of case processing that would be affected were the judge in the case to find that the state met these requirements.

As of July 2004, the only state found by a federal court to have complied with the statutory opt-in rules is Arizona,[22] but judges can expect more states to claim that they have revised their procedures to conform with these requirements.

To qualify for expedited processing of capital habeas petitions, Chapter 154 requires the state to establish "a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings" for all indigent death-sentenced prisoners; the state must offer counsel to all state prisoners under capital sentence; and it must further provide standards of competency for such appointments.[23] If the judge finds the state has met these requirements, the following procedures and deadlines apply to processing of section 2254 petitions filed in federal courts in that state.

21. Clay v. United States, 537 U.S. 522 (2003).

22. Spears v. Stewart, 267 F.3d 1026, 1041 (9th Cir. 2001) (finding that "as of July 17, 1998, Arizona, through statutes and supreme court rules, had established a system that, on its face, entitled the state to opt in to the procedures of Chapter 154," but that, in the case at hand, had not followed its new scheme, failing to promptly appoint post-conviction counsel, and therefore could not benefit from the special procedures).

23. 28 U.S.C. § 2261 (West 2004).

Table 1: Expedited Procedures for "Opt-In" States

Stage of Litigation	Special Procedures for Opt-In States
Stay of Execution	First § 2254 petition: automatic stay must issue. § 2262(b). Successive petitions: no stay unless filing authorized by the court of appeals. § 2261(c).
Petition Filing Deadlines	Petition must be filed within 180 days after "final state court affirmance of the conviction and sentence on direct review or the expiration of time for seeking such review." § 2263(a). Federal court can extend deadline by 30 days upon showing of good cause by petitioner. § 2263(b)(3).
Amended Petitions	Petitioner can amend only if claim meets the grounds for successive petitions to be filed. § 2266(b)(3)(B).
Unexhausted Claims	May be reviewed only if the failure to raise the claim properly in state court (1) was the result of unconstitutional state action, (2) was because the Supreme Court newly recognized a federal right that is retroactively applicable to the case, or (3) was because the claim was based on facts that could not have been discovered in time to present earlier. § 2264(a).
Federal Review Deadlines	180 days for final determination on the merits, including 120 days for parties to complete all actions (pleadings, briefs, hearings). §§ 2266(b)(1), (b)(2). Court may extend deadline by no more than one 30-day period, upon showing that "the ends of justice served by the delay outweigh the interests of the public and the parties in speedy disposition." § 2266(b)(1). Capital habeas petitions given priority over all non-capital matters in both district courts and courts of appeal. § 2266(a).
Determination of Appeal of Denial of § 2254 Petition	120 days after reply due or answer brief filed. Petition for rehearing or for rehearing en banc must be decided within 30 days of date that petition or responsive brief is filed. If rehearing is granted, appellate court must render final determination within 120 days after issuance of order granting the rehearing. § 2266(b)(4)(B).

2. Tolling Issues Raised by "Mixed" Petitions

In *Duncan v. Walker*, 533 U.S. 167 (2001), the Supreme Court held that tolling under 28 U.S.C. § 2244(d)(2) of the limitations period for a section 2254 petition during the pendency of "other collateral review" does not include federal habeas corpus review. This holding directly affects the management of cases involving "mixed" petitions (containing both exhausted and unexhausted claims)[24]—these cases must be sent back to state court for exhaustion of state remedies. Under *Duncan*, the limitation period is not tolled during the pendency of a petition in federal court, and therefore (depending on the time the pe-

24. For further explanation of "mixed" petitions and the exhaustion requirement, see *infra* section II.F.

titioner takes to file in federal court or the time the judge takes to determine that the petition must be sent back to state court) the limitation period could expire before the petitioner can return to federal court after state exhaustion, thus resulting in the complete denial of federal review of potentially valid habeas corpus claims. Section II.F.1 *infra* discusses case-management options available to district judges in this situation.

D. Successive Petitions

The practical result of federal habeas corpus law minimizing the number of times a capital defendant may file a petition is essentially a "one-shot" habeas corpus regime. That regime places a great deal of importance on the first petition filed because this likely will be the only petition reviewed on the merits. Judges sometimes mention this importance in initial orders of appointment and procedure. Because of the emphasis on the first petition, judges can expect counsel to request significant time and expense in preparation of that petition, especially if they are new to the case.[25]

A judge who determines that the petition before the court is not a first petition must determine whether, nevertheless, to hear the petitioner's claims. There are two types of successive petitions: (1) those that present no new claims for relief that were not already adjudicated in the earlier proceedings;[26] and (2) those that do present new claims.

Petitions in which no new claims are presented must be dismissed (section 2244(b)(1)). Section 2244(b)(2) prohibits federal review of successive petitions that raise new claims different from those included in the first petition, except in two situations: (1) the claim "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," or (2) "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence and the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense."

Successive petitions must also conform to a procedural requirement. In order to file a successive petition in the district court, a section 2254 petitioner must first obtain an order authorizing such filing from a three-judge panel of the court of appeals.[27] The court of appeals may grant such an order only if the petition makes a prima facie showing of one of the two prongs now governing federal review of new claims (listed in the preceding paragraph).[28] For successive section 2255 habeas corpus petitions, certification by the court of appeals also is required, with a similar finding regarding the claims, but in a

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25. *See* McCleskey v. Zant, 499 U.S. 467, 498 (1991) ("petitioner must conduct a reasonable and diligent investigation aimed at including all relevant claims and grounds for relief in the first federal habeas petition").

26. *See* Stewart v. Martinez-Villareal, 523 U.S. 637 (1998) (holding that second presentation of "competency to be executed claim" did not constitute a successive petition because, when presented in first petition, the claim was unripe for adjudication and therefore dismissed as premature).

27. 28 U.S.C. § 2244(b)(3)(B) (West 2004). *See* Appendix E-4 (Order Dismissing Successive Petition for Lack of Authorization from Court of Appeals—District of Nevada).

28. 28 U.S.C. § 2244(b)(3)(C) (West 2004).

slightly different formulation.[29] The court of appeals must make its decision to grant or deny the application within thirty days,[30] and its decision is not appealable or subject to a writ of certiorari to the U.S. Supreme Court.[31]

1. Complications with *Ford v. Wainwright* Claims

Complications arise in applying the strict limitations on successive petitions to petitions raising the claim that the petitioner is incompetent to be executed.[32] If a death-sentenced inmate raises this claim in his or her initial petition, it will be dismissed because the execution is not, at that point, imminent. If the claim is raised again in a successive petition, it would seem to be barred by 28 U.S.C. § 2244(b)(1), which holds that any claim presented in a successive petition that has been presented in a previous petition must be dismissed. However, in *Stewart v. Martinez-Villareal,* 523 U.S. 637 (1998), the Supreme Court held that because the original claim was dismissed without prejudice, the later claim was not in fact "successive," and thus section 2241(b) did not apply.

What if the inmate did not raise the incompetence claim at the initial petition? Such an approach would seem reasonable, considering that the claim would be dismissed as premature. It is also possible that the incompetence did not manifest until after the original petition had been filed. The claim would seem to be barred by 28 U.S.C. § 2244(b)(2), which forbids consideration of claims raised for the first time in a successive petition, with narrow exceptions. (An incompetence-to-be-executed claim does not meet any of those exceptions.) The Supreme Court specifically declined to address this issue in *Martinez-Villareal*, but in *Richardson v. Johnson*[33] the Fifth Circuit held that the plain language of section 2241(b)(2) barred consideration of a *Ford* claim raised for the first time in a successive petition.

While the Fifth Circuit stated that "*Ford* claims have an uneasy fit with the AEDPA," it may be more accurate to say that they do not fit into the statute at all. In attempting to restrict successive petitions, the drafters of the AEDPA apparently did not take into account that, by their nature, incompetence-to-be-executed claims must be raised that way. While the Supreme Court saved a previously raised incompetence claim in *Martinez-Villareal*, the Fifth Circuit found no way to save a *Ford* claim that had not been raised previously.

The lesson from this is clear: Unless the statute is modified to make an exception for "late blooming" claims, such as incompetence to be executed, or unless the Supreme

29. 28 U.S.C. § 2255 (West 2004) (successive motions authorized if containing "(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable fact finder would have found the movant guilty of the offense; or (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable").

30. 28 U.S.C. § 2244(b)(3)(D) (West 2004).

31. *Id.* § 2244(b)(3)(E). This provision was upheld against constitutional challenge in *Felker v. Turpin*, 518 U.S. 651 (1996); but see *Castro v. United States*, 124 S. Ct. 786, 791 (2003), holding that certiorari review is not prohibited where petitioner did not seek authorization to file a successive petition or where the "subject" of the petition is not the circuit court's "denial of an authorization."

32. Ford v. Wainwright, 477 U.S. 399 (1986).

33. 256 F.3d 257 (5th Cir. 2001).

Court or other courts of appeals interpret section 2244(b)(2) differently than the Fifth Circuit did, the only time a district court will be able to address the merits of a *Ford* claim will be when the claim has been presented in the inmate's original petition, dismissed as premature, and then brought again in a successive petition when execution is imminent.

E. Amended Petitions

Section 2242 permits a petitioner to amend a petition for writ of habeas corpus pursuant to the Federal Rules of Civil Procedure. After a brief period in which a party may amend as of right, the judge has sole discretion to grant leave to amend, upon consideration of four factors enumerated in *Foman v. Davis*, 371 U.S. 178 (1962).

The availability of amendment takes on special significance in light of the doctrines limiting successive and abusive petitions where the petitioner knew or should have known, at the time of the initial filing, of the claims sought to be added. Allowing amendment enables review of claims that may be barred under the restrictions on successive petitions. It also is relevant to the abeyance of mixed petitions where some claims are unexhausted and must be sent back to state court, and the petition is later amended to include the newly exhausted claims. In both of these cases amendment is a tool that may enable review of a petition as a first "one-shot" petition, despite some time delay between its first presentation to the court and the time of actual substantive review.

F. Exhaustion of State Remedies; Mixed Petitions

Assuming a section 2254 petition is not dismissed on a basis already described, the judge must determine whether the petitioner has exhausted all available state remedies and is therefore potentially eligible for federal relief. Section 2254(b)(1)(A) provides that federal habeas corpus relief is not available to a state inmate unless he or she has "exhausted the remedies available in the courts of the state." This exhaustion requirement is satisfied if the claims have been "fairly presented" to the highest state court.[34] If the federal claims have not been exhausted in state court, the claims may nevertheless still be reviewable for federal habeas corpus relief if "there is an absence of available State corrective process" or "circumstances exist that render such process ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1)(B). If, however, a judge perceives that habeas corpus relief will not be granted, he or she may ignore the exhaustion issue and deny a petition on the merits, notwithstanding a petitioner's failure to exhaust. 18 U.S.C. § 2254(b)(2).

For section 2255 petitions from federal prisoners there is no exhaustion requirement, but the petitioner must complete all direct appeals before filing a section 2255 motion. Failure to raise a claim at trial or on direct appeal usually results in a procedural bar of the claim, necessitating a showing of cause and prejudice or a miscarriage of justice to justify federal collateral review, similar to the procedural default rules for section 2254 cases.[35]

If a judge finds that a section 2254 petition contains some unexhausted claims, two important case-management questions arise: (1) How can the judge handle a mixed petition returned for exhaustion such that potentially valid claims are not barred by the one-

34. O'Sullivan v. Boerckel, 526 U.S. 838 (1999); Picard v. Connor, 404 U.S. 270, 275 (1971).

35. See *infra* section II.G for more details.

year limitations period? and (2) How should representation of the petitioner during state exhaustion be funded?

1. Management of Mixed Petitions Returned for Exhaustion

In *Rose v. Lundy*, 455 U.S. 509 (1982), the Supreme Court held that a federal judge may not adjudicate a "mixed" section 2254 petition—a petition made up of both exhausted and unexhausted claims. Instead, the judge must either dismiss the petition entirely and send it back to state court or allow the petitioner to amend it to present only exhausted claims. Dismissal of a mixed petition is without prejudice, so the petitioner may return to federal court after exhaustion. The one-year filing deadline,[36] however, creates questions about what a federal judge should do with the petition while it is back in state court to avoid barring a potentially valid federal claim. Several case-management options may be available in this situation.

Some district judges have used equitable tolling. Although the Supreme Court has held, in *Duncan v. Walker*,[37] that filing of a section 2254 petition does not automatically toll the statute of limitations, two justices in concurring opinions have stated that this holding does not affect a federal court's power to equitably toll a limitations period.[38] Nevertheless, there has as yet been no majority Supreme Court decision defining the scope and viability of equitable tolling in such situations.

Another option for a judge reviewing a mixed petition is to retain jurisdiction pending complete exhaustion of state remedies, thus enabling the first filing date (which met the one-year deadline) to control the case after the petitioner returns from state court and amends the petition to include only exhausted claims.[39] In this situation, some federal judges hold the exhausted claims in abeyance while the unexhausted claims are sent back to state court.[40] Alternatively, the judge could hold the petition in abeyance but not grant a stay of execution; thus, if the petitioner takes too long to appear in state court on exhaustion, the state attorney general might seek an execution date to speed things up. Another variation used by some district judges has been to issue a stay of execution conditional upon a filing of unexhausted claims in state court by a certain date (e.g., thirty days) warning that if petitioner fails to do so, the petition will be dismissed. As of June

36. *See* 28 U.S.C. § 2244(d)(1) (West 2004).

37. 533 U.S. 167 (2001).

38. *Id.* at 183 (Stevens, J. & Souter, J., concurring).

39. *See, e.g.*, Kethley v. Berge, 14 F. Supp. 2d 1077 (E.D. Wis. 1998) (dismissing mixed petition without prejudice and allowing petitioner to retain original filing date to avoid the statute of limitations); Williams v. Vaughn, 1998 U.S. Dist. LEXIS 6658 (E.D. Pa.) (holding that, to avoid the limitations bar, amended petition dismissed without prejudice for unexhausted claims would "relate back" to the original pre-AEDPA petition pursuant to Fed. R. Civ. P. 15(c)).

40. *See, e.g.*, Zarvela v. Artuz, 254 F.3d 374 (2d Cir. 2001) (holding that since dismissal of initial petition jeopardized timeliness of subsequent petition, later petition was treated as if only the unexhausted claims of the initial petition were dismissed and proceedings on the exhausted claims were stayed); Calderon v. United States Dist. Court for the N. Dist. of Cal. (Taylor), 134 F.3d 981 (9th Cir.) (holding that the district court had authority to allow amendment to delete unexhausted claims from mixed petition and hold the amended, fully exhausted petition in abeyance subject to further amendment reincorporating the deleted claims after state litigation), *cert. denied*, 525 U.S. 920 (1998).

2004, no Supreme Court majority had addressed the question of proper post-AEDPA, post-*Duncan* abeyance procedures.

Another approach might be to dismiss the entire mixed petition for exhaustion as soon as possible, so as to allow the petitioner sufficient time to return to federal court within the limitations period and motivate the petitioner to appear in state court quickly enough to toll the clock. Finally, a judge who believes that a petitioner's claims are non-meritorious in the first place, regardless of exhaustion, can avoid the abeyance question altogether and deny the mixed petition on the merits, following the specific approval of this practice in 28 U.S.C. § 2254(b)(2). Thus, some districts and individual judges request initial briefing on not only exhaustion status and other procedural issues, but also the merits of every claim. This works well for some judges, but others have faced some difficulty with this approach if the state attorney general does not brief the merits in the initial phases of the case.

2. Funding for Representation of Petitioner in State Exhaustion Proceedings

As mentioned previously, sending a section 2254 case back for state exhaustion creates additional case-management decisions. As stated in 21 U.S.C. § 848(q), appointed counsel must represent the defendant through "every subsequent stage of judicial proceedings." Similarly, 28 U.S.C. § 2254 allows a federal judge to appoint counsel "in any subsequent proceedings on review." The funding question presented by mixed petitions is this: Is state exhaustion within the scope of "every subsequent proceeding" warranting federal compensation for such representation? In other words, may a federally appointed attorney appear for his or her client in state court for exhaustion proceedings? Most federal judges have been unwilling to pay counsel for representation on state exhaustion, following the Eleventh Circuit Court of Appeals in *In re Lindsey*, 875 F.2d 1502 (11th Cir. 1989), which held that section 848(q)'s reference to "subsequent stage[s] of judicial proceedings" does not encompass state-convened proceedings.

The Judicial Conference Committee on Defender Services (the body that allocates federal defender services funds) has stated that "Defender Services appropriated funds may not be used to represent an individual under a state-imposed death sentence in a state proceeding unless a presiding judicial officer in a federal judicial proceeding involving the individual has determined that such use of Defender Services appropriation funds is authorized by law."[41] The committee recognized that courts have treated the matter as a legal question rather than a policy issue. Individual federal judges and districts have taken various case-management measures to facilitate the handling of cases on state exhaustion, such as appointing state-funded co-counsel or directing counsel to other state-funded resources.[42] In the Central District of California, when a judge grants a stay or abeyance motion for the purpose of allowing the petitioner to exhaust in state court, as a matter of policy the motion is taken as authorization for defender services funds to support the federal defender's appearance in state proceedings.

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41. Report of the Committee on Defender Services to the Judicial Conference of the United States 9–10 (March 1999).

42. See *supra* section II.A.1 for further discussion of these and other approaches.

A parallel question is whether a federal judge may or should authorize payment of investigative or expert services during litigation of unexhausted claims. Some courts (such as the Fifth and Sixth Circuits)[43] following *Lindsey* have refused to authorize such use of CJA funds, while the Ninth Circuit has allowed it.[44]

The courts of appeal disagree over whether the section 848(q) language of "every subsequent proceeding" includes state clemency proceedings. For example, the Fifth Circuit has held that the statute does not provide for funding of state clemency proceedings.[45] The Eighth Circuit, on the other hand, citing *Lindsey*, has concluded that although state judicial proceedings are not covered, "reasonably necessary" federal funding for state clemency proceedings may be allowed, at least under certain circumstances.[46]

G. Procedural Default; Adequate and Independent State Bar

As a matter of comity and federalism, federal courts will not review a petitioner's claim that was denied by a state court based on independent state law adequate to support the judgment.[47] The "adequate and independent state ground" doctrine itself is a rather complex area of federal case law requiring, among other things, a finding that the state rule is not ambiguous and is "firmly established and regularly applied."[48] When such a state procedural rule (e.g., requiring timely presentation of claims) bars a federal claim in state court, then a federal judge may not review the merits of that claim in a section 2254 habeas corpus petition, unless petitioner shows cause and prejudice or shows that a miscarriage of justice would otherwise result.[49] From a federal judge's perspective, if a petitioner

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43. *See, e.g.*, House v. Bell, 332 F.3d 997 (2003); Sterling v. Scott, 26 F.3d 29 (5th Cir. 1994).

44. *See* Calderon v. United States Dist. Court (Gordon), 107 F.3d 756 (9th Cir. 1997) (holding district court within its discretion to determine whether section 848(q) request for investigative fees would assist petitioner in preparing for federal habeas defense, even though funds would be used for state exhaustion).

45. Clark v. Johnson, 278 F.3d 459 (5th Cir. 2002).

46. Hill v. Lockhart, 992 F.2d 801 (8th Cir. 1993) (allowing federal funding for state clemency proceedings if requested "as part of a non-frivolous federal habeas corpus proceeding" where "state law provides no avenue to obtain compensation for these services," and, in most cases, request is made prior to performing the services; ultimately disallowing funding because of failure to meet these requirements).

47. Wainwright v. Sykes, 433 U.S. 72 (1977) (federal courts generally may not review a state court's denial of a state prisoner's federal constitutional claim if the state court's decision rests on a state procedural default that is independent of the federal question and adequate to support the prisoner's continued custody, without cause and prejudice). Any other rule would essentially allow section 2254 petitioners to evade the exhaustion requirement and the principle of federalism respecting the "States' interest in correcting their own mistakes." Coleman v. Thompson, 501 U.S. 722, 731–32 (1991).

48. Ake v. Okla., 470 U.S. 68, 74–75 (1985) (state rule based in part on federal law is not independent state ground); Ford v. Ga., 498 U.S. 411, 423–24 (1991) (adequate state law must be "firmly established" and "regularly applied" at the time of default). There is a narrow allowance for "exorbitant application" of an otherwise sound state rule to render that rule inadequate to bar federal review. Lee v. Kemna, 534 U.S. 362 (2002).

49. Coleman v. Thompson, 501 U.S. 722 (1991); Murray v. Carrier, 477 U.S. 478 (1986) (clarifying meaning of "cause"); United States v. Frady, 456 U.S. 152 (1982) (specifying that "prejudice" must mean actual and substantial disadvantage); Smith v. Murray, 477 U.S. 527 (1986) (distinguishing between "actual" and "legal" innocence, and concluding that when an alleged constitutional error "did not serve to pervert the jury's deliberations concerning the ultimate question" of whether petitioner constituted a continuing threat to

alleges cause and prejudice to overcome a state procedural bar, then the resolution of the procedural default issue can overlap significantly with the merits of the claim, thus raising difficult case-management issues.[50]

Before filing a section 2255 motion, a federal prisoner must complete all direct appeals to avoid a procedural bar of any habeas claims. To justify federal collateral review of claims without complete direct appeals, the prisoner must show cause and prejudice or a miscarriage of justice.[51] This doctrine parallels the procedural default rules for section 2254 cases with one significant exception: The Supreme Court has held that ineffective assistance of counsel claims may be brought in a section 2255 proceeding whether or not petitioner could have raised the claim on direct appeal.[52]

Another case-management issue arises when one views the procedural default doctrine in conjunction with the exhaustion requirement:[53] A section 2254 petitioner might have not presented (and thus not exhausted) a claim in state court because he thought a state procedural bar prohibited the claim. Such a claim might nevertheless gain the opportunity to be reviewed in a federal habeas corpus petition if the federal judge finds that the state procedural rule is not an adequate and independent state ground, or that the existence of cause and prejudice or miscarriage of justice justify federal review despite the procedural default. To avoid improperly reviewing an unexhausted claim in this situation, the judge might investigate whether the petitioner's failure to present the claim in state court falls within the section 2254(b)(1)(B) exemption for exhaustion (i.e., the absence of an available state corrective process, or the state process would be ineffective to protect the petitioner's rights). But making such a finding is a difficult task, especially if the judge must base his or her finding solely on the existence of a state procedural bar.

If the judge anticipates ultimate denial of relief, he or she may invoke section 2254(b)(2), which authorizes a federal judge to deny habeas corpus relief on the merits notwithstanding the presence of unexhausted claims.

H. Evidentiary Hearings

A federal judge may not hold an evidentiary hearing on a claim for which a section 2254 petitioner "has failed to develop the factual basis [] in State court proceedings" unless the claim relies on (1) "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" or (2) "a factual predicate that could not have been previously discovered through the exercise of due diligence" and, in addition to one of these, "the facts underlying the claim would be suffi-

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society, refusal to consider the defaulted claim did not carry with it "the risk of a manifest miscarriage of justice" (477 U.S. at 538)).

50. *See, e.g.,* Strickler v. Greene, 527 U.S. 263, 282 (1999) (involving procedurally defaulted *Brady* claim, and cause and prejudice, asserted by petitioner to avoid the bar, constitute two components of the alleged *Brady* violation itself).

51. *Frady*, 456 U.S. 152; Bousley v. United States, 523 U.S. 614, 621 (1998).

52. *See* Massaro v. United States, 123 S. Ct. 1690 (2003) (holding that requiring a criminal defendant to bring ineffective-assistance claims on direct appeal does not promote objectives of the procedural default rule, such as conserving judicial resources and respecting the law's important interest in the finality of judgments).

53. *See supra* section II.F.

cient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2254(e)(2).[54] For section 2255 cases involving federal prisoners, the availability of an evidentiary hearing is left to the discretion of the judge upon review of the record.[55]

Even where an evidentiary hearing is not prohibited by section 2254(e), federal judges usually consider several factors in deciding whether to grant a hearing request.[56] One important factor is the amount of detail provided in the state's factual record—where there is more information provided, there may be less likelihood that a federal hearing will be needed. Nationwide, evidentiary hearings are held rather infrequently.

Judges who grant requests for evidentiary hearings often initiate additional case-management procedures specific to preparing for such a hearing.[57] For example, the judge may recommend that the parties meet and confer within a specified time, or may require a pre-hearing conference in which both parties meet with the judge to discuss how the hearing will substantively proceed. Some judges remind the parties that disputed facts can be resolved in a variety of ways, live testimony being only one. Other methods include review of declarations or stipulation of counsel instead of live testimony, both of which are more efficient and cost-effective from a case-management perspective, reducing the number of issues demanding specific attention at the live evidentiary hearing.[58]

I. Scope of Federal Review

Assuming all procedural criteria have been met, the court takes up the substance of a section 2254 capital habeas petition to determine whether relief should be granted. Section 2254(d) states that federal habeas corpus relief will not be granted with respect to any claim adjudicated on the merits in state court unless the adjudication of the claim

1. resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or
2. resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.[59]

There has been considerable litigation since the AEDPA's enactment over the meaning and application of this standard. Some key issues include the meaning of "contrary to," "unreasonable application of," and "clearly established Federal law, as determined by the

54. *See also* Williams v. Taylor, 529 U.S. 420 (2000) (holding that failure to develop factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to prisoner or prisoner's counsel).

55. *See* Rule 8 of the Rules Governing Section 2255 Cases.

56. See, from example, the factors laid out, pre-AEDPA, in *Townsend v. Sain*, 372 U.S. 293 (1963), illustrating relevant issues involved in a decision of whether to hold an evidentiary hearing. After AEDPA, if the section 2254(e) hurdles preventing an evidentiary hearing are satisfied, then the *Townsend* factors are relevant to a judge deciding whether to hold an evidentiary hearing.

57. *See, e.g.,* Appendix E-3 (Evidentiary Hearing Scheduling Order—Central District of California).

58. *See, e.g.,* Appendix A-4 (Case-Management Plan for Northern District of California).

59. 28 U.S.C. § 2254(d) (West 2004).

Supreme Court."[60] A judge should consult circuit law carefully when ruling on these issues.

J. Federal Review Deadlines

In states that have not met the statutory criteria for expedited processing of capital habeas cases (see *supra* Table 1), there are no limitations on the amount of time federal judges can take to review a capital habeas corpus petition. In a state that has met the criteria, section 2266(b)(1) directs the district judge to render a final determination on the merits within 180 days of the filing of the petition. Given that only one state has been found to comply with Chapter 154's opt-in requirements, the constitutional issues raised by its limitations on federal review have yet to be litigated.

K. Appellate Review

Provided the petitioner timely files a notice of appeal, following final determination of the habeas corpus petition a district court is required by Federal Rule of Appellate Procedure 22 and 28 U.S.C. § 2253 to either issue a certificate of appealability (COA) or state reasons for not issuing one. Without such a certificate, no appeal from either a section 2254 or 2255 denial may proceed. The law requires a "circuit justice or judge" to issue a COA only upon a "substantial showing of the denial of a constitutional right."[61] In 2003, the Supreme Court cautioned that a court should not refuse to grant the COA simply if it believes the petitioner will not prevail on the merits.[62]

Petitioner's counsel might make a practice of filing a motion for amendment of judgment under Federal Rule of Civil Procedure 59 prior to filing a request for certificate of appealability, as occurs with some counsel in the Eastern District of Texas, for example.

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60. *See, e.g.*, Williams v. Taylor, 529 U.S. 362 (2000) (holding that petitioner's constitutional right to effective assistance of counsel was violated, and state supreme court's refusal to set aside death sentence was contrary to, or involved an unreasonable application of, federal law within the meaning of section 2254(d)(1)); Bell v. Cone, 535 U.S. 685 (2002) (holding claim governed by *Strickland* and that state court decision was neither "contrary to" nor involved an "unreasonable application of clearly established Federal law" under section 2254(d)(1)); Lockyer v. Andrade, 538 U.S. 63 (2003) (holding that the Ninth Circuit erred in ruling that the California Court of Appeals' decision affirming consecutive terms of twenty-five years to life in prison for a "third strike" conviction is contrary to, or an unreasonable application of, clearly established federal law of gross disproportionality in punishment).

61. 28 U.S.C. § 2253 (West 2004). The Fifth Circuit has held that a district court may rule on a certificate of appealability sua sponte. Alexander v. Johnson, 211 F.3d 895, 897 (5th Cir. 2000). The courts of appeal are divided on the question of whether a district judge may issue a certificate of appealability. Compare, for example, *Grant-Chase v. Commissioner N.H. Dept. of Corrections*, 145 F.3d 431, 435 (1st Cir. 1998), and *United States v. Asrar*, 116 F.3d 1268, 1270 (9th Cir. 1997), holding that a certificate of appealability can be issued by either a district or appellate judge, with *Parker v. Norris*, 929 F. Supp. 1190 (E.D. Ark. 1996), holding that only appellate judges may issue such certificates. Where district judges are found to hold this authority, a case-management mechanism is set up to consider the merits of a request for certificate of appealability in the order denying the habeas petition. This is the practice in the Southern District of Texas, for example.

62. Miller-El v. Cockrell, 537 U.S. 322 (2003) (holding that Fifth Circuit should have issued a COA because section 2253(c)(2) requires only a substantial showing of the denial of a constitutional right, through showing that jurists of reason could disagree with the district court's resolution of the constitutional claims or could conclude the issues were adequate to deserve encouragement to proceed further).

The purpose of Rule 59, however, is to allow a district court to "correct its own errors, sparing parties and appellate courts the burden of unnecessary proceedings," not to serve as an additional step on the road to habeas corpus appellate review. A judge attentive to capital case management concerns of delay and unnecessary litigation may choose, therefore, to pay particular attention to the appropriate use of Rule 59.

III. District-Wide and Circuit-Wide Approaches to Capital Habeas Corpus Case Management

This section summarizes several of the procedures, policies, and programs federal courts have implemented to meet the aggregate case-management needs of capital habeas cases in their jurisdictions and to track the progress of capital habeas cases within the district or circuit.

A. Case-Management Plans

Some districts have developed model case-management plans to standardize to some extent the processing of individual capital habeas cases across their courts, and one circuit's council, the Ninth's, has developed a plan for adoption by all districts in the circuit. Plans include guidance about such things as pretrial filings and deadlines, case budgeting, and standard orders for various phases of the litigation that can be tailored according to the preferences of each judge. Appendix A provides a more detailed description of the Ninth Circuit's judicial council's plan, along with other examples of case-management plans.

B. Standardized Budgeting and Voucher Review

1. Standard Budgeting Orders

For cases involving CJA appointments, some district courts have standard orders requiring counsel to submit a budget prior to voucher approval. For example, the Western District of Oklahoma includes budgeting in its standard "general procedures" order following appointment of counsel.[63] For the Ninth Circuit, budgeting is a central part of its circuit-wide capital case management plans.[64] In most districts in the Ninth Circuit, death penalty law clerks monitor the budgeting scheme, doing everything from preparing the initial budgeting forms (with details about each phase according to the case evaluation form) for dissemination to counsel to reviewing the submitted expenses for reasonableness and compliance with projected budgets. After counsel has had a chance to conduct preliminary review of the budgeting materials, the law clerk assists in a telephone conference to address any questions counsel might have about format and quantifying work for the forms, noting that the court is receptive to later modifications for good cause. Attorneys are advised to break the tasks into the smallest parts possible, as this helps the court to determine whether an estimate is reasonable and to isolate areas of concern. (If there is a concern, the law clerk discusses it with counsel or schedules an ex parte meeting with the judge to resolve the issue.)

After counsel submits the budget (with appropriate declarations detailing how figures were calculated), the law clerk reviews it and gives the judge any recommendations for amendment. After the judge approves the final budget, the law clerk (or other court staff designated for this duty) reviews submitted vouchers for consistency with the budget and

63. *See* Appendix B-9 (Counsel Appointment Order—Western District of Oklahoma).
64. *See* Appendix A-1.

forwards any comments to the judge before vouchers are authorized for payment. The CJA supervising attorney does this work in the Northern District of California.

2. Standardized Voucher Review

Whether or not a budget is required, some courts have concluded that having individual judges or their staffs review CJA vouchers creates potential problems. First, there is generally no uniform standard within a court by which attorneys are compensated: one attorney's fee may be reduced for being unreasonable while a similar fee from another attorney is upheld, depending on who happens to do the review. Second, the practice of judges or their staff conducting such review may involve ex parte communications; moreover, some may consider it improper for federal judges or their staff to supervise a litigant's work. On the other hand, using death penalty law clerks[65] to conduct such review in districts where they are available impinges on time they would otherwise devote to substantive and procedural review of habeas corpus petitions, especially important in courts with a large caseload backlog needing attention.

It was in response to some of these concerns that the Judicial Conference of the United States approved three pilot "CJA supervising attorney" positions in 1997 and 1998.[66] Under this pilot program, CJA supervising attorneys in the Northern and Central Districts of California and the District of Maryland reviewed the CJA vouchers submitted to their courts (in both capital and non-capital cases). A 2001 study reported that these courts were pleased with the focused and timely attention these vouchers received and the institutional expertise the attorneys developed as to reasonable hours and fees for the discrete work of attorneys, experts, and investigators.[67] In March 2002, the Judicial Conference endorsed the establishment of a CJA supervising attorney position in courts that would find it of value. In courts that choose to establish such positions, they are funded using decentralized salaries and expense account funding.

C. Capital Case Committees

At least two circuits have established committees to monitor capital cases in the district courts of those circuits. The Eighth Circuit's Ad Hoc Committee on the Death Penalty conducts regular monitoring of the capital cases throughout the circuit, reviewing quarterly reports submitted by each of its district courts, and sometimes recommends reassignment of cases in overloaded courts. The Ninth Circuit's judicial council created the circuit's Capital Case Committee as a central forum for addressing the variety of capital case issues anticipated by the circuit as the district court's capital habeas corpus caseload steadily increased. The committee is composed of several district judges, a circuit judge, a magistrate judge, a clerk of court, a federal defender, and a court administrative staff member. The committee's centralized attention to capital case issues enabled the judicial council to gather broad-based data to examine problems on a circuit-wide basis and to

65. *See infra* section III.D.

66. *See* Tim Reagan et al., The CJA Supervising Attorney: A Possible Tool in Criminal Justice Act Administration 21 (Federal Judicial Center 2001).

67. *Id.* at 7.

implement specific responses. The committee developed innovations, such as the death penalty law clerk program,[68] standardized case-tracking reports,[69] a phased case-management and budgeting plan,[70] and the *Ninth Circuit Capital Punishment Handbook* (a substantive law resource guide).[71] An offshoot of the Capital Case Committee, the CJA Capital Habeas Oversight Committee (now merged with the Capital Case Committee), assisted the council's effort to budget all capital cases in the circuit, meeting quarterly for regular oversight of the submitted budgets before they went on to the judicial council for final review.

Some district courts also have capital case committees for centralized discussion of death penalty issues facing judges and staff, from docketing to counsel appointment.[72] These committees generally oversee common capital habeas corpus matters, such as counsel appointment and compensation (e.g., maintaining a panel list of eligible attorneys and setting guidelines for attorneys' fees), modifying local rules as needed, monitoring the death penalty law clerk workload, and devising general case-management policies.

D. Death Penalty Law Clerks

The Judicial Conference of the United States has authorized permanent, centrally funded death penalty law clerk positions for districts in circuits with a specified number of capital habeas corpus cases. The death penalty law clerks respond to the need, first perceived in the district courts of the Ninth Circuit, for institutional expertise assisting federal judges facing an increasing number of complex capital habeas corpus cases that generally remain in the system for longer than the one- or two-year tenure of a judge's elbow clerks.[73]

Death penalty law clerks perform the same task throughout the country: They serve as a specialized capital habeas corpus reference for the judges in their courts, and they usually work directly on most if not all of the capital habeas corpus petitions presented there, assisting with both procedural and substantive issues. Most death penalty law clerks serve all of the judges in the district because the clerks work on all capital cases in the district. That is, each judge with a capital case generally uses the death penalty law clerks in lieu of a chambers law clerk for substantive legal assistance in reviewing and ruling on a petition. However, this pattern is not pervasive for all federal judges in all districts nationwide: Some prefer to keep their chambers law clerks working on these cases, while some districts divide the early work of capital habeas petitions (such as appointment of counsel

68. *See infra* section III.D.

69. *See infra* section III.E.

70. *See supra* section III.A and Appendix A-1.

71. This publication is available online at www.ce9.uscourts.gov (last visited June 4, 2004).

72. This is true, for example, in the Central and Northern Districts of California. *See* Appendices A-3 (Capital Case Management Plan—Ninth Circuit) and A-4 (Case Management Plan—Northern District of California).

73. District courts from the Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits have been authorized death penalty law clerk positions, though not all have been requested and filled. In many circuits, these law clerks keep in close regular contact, using E-mail lists and conferences to enable efficient exchange of expertise and innovative analyses of current law.

and scheduling) among magistrate judges. As a result of their work on multiple cases, death penalty law clerks often serve as central information centers for the status of all the capital cases in a given district, and they know the nature of each case in comparison to others in the system—a comparison that is important for budgeting and case management.

Most death penalty law clerks help draft the initial orders setting the case on track, such as orders appointing counsel, scheduling (especially for case-management conferences, if any), and filing deadlines.[74] In the phased case-management and budgeting plans of the Ninth Circuit,[75] for example, the death penalty law clerks help to keep the parties on track in the series of events required before petition filing. Death penalty law clerks in many courts also review the budgets and CJA voucher compensation requests submitted by petitioners' counsel.[76]

E. Case Status Reports

Regular updates on the status of pending cases, prepared by death penalty law clerks where available, describe the status of each capital case pending in the court. Many death penalty law clerks keep updated case status reports for their own internal use and for regular presentation to a local capital case committee, a district, or simply the judge assigned to a case. This is true, for example, of death penalty law clerks in the Western District of North Carolina, the Eastern and Northern Districts of Texas, the Southern District of Ohio, and the Eastern District of Missouri.

Some courts require a standard status report be periodically submitted to the circuit judicial council. Such a report might include the following information:

- case name, case number, judge;
- date received by court, length of state court record;
- counsel name(s), date appointed;
- date(s) petition(s) filed/due;
- date answer(s)/motion for summary judgment filed/due;
- date traverse/response filed/due;
- state exhaustion status;
- motion(s) under submission, date submitted;
- date evidentiary hearing scheduled/held;
- next scheduled action and date;
- work done during this period;
- fees paid before petition filed (attorney fees, expenses, expert/investigative);
- fees paid since petition filed (attorney fees, expenses, expert/investigative); and
- total fees paid to date (attorney fees, expenses, expert/investigative, total).[77]

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74. *See* Appendices B through E for samples of some of these orders, provided by death penalty law clerks in each district indicated.

75. *See* Appendix A-1.

76. *See supra* section II.A.2.

77. *See* Appendix A-6 (District Court Case Tracking Form—Ninth Circuit).

F. State–Federal Judicial Councils

Federal and state courts created state–federal judicial councils in the early 1970s, in response to Chief Justice Warren Burger's call for such institutions to reduce state–federal tension. In 2003, councils were in place in about thirty states, but not all met regularly.[78] Frictions caused by state prisoner habeas petitions in federal courts have been a staple of council business.[79]

78. Data on file, Research Division, Federal Judicial Center.

79. James G. Apple, Paula L. Hannaford, & G. Thomas Munsterman, Manual for Cooperation Between State and Federal Courts (1997) (see section I.D, "Habeas Corpus and Appellate Matters").

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About the Federal Judicial Center

The Federal Judicial Center is the research and education agency of the federal judicial system. It was established by Congress in 1967 (28 U.S.C. §§ 620–629), on the recommendation of the Judicial Conference of the United States.

By statute, the Chief Justice of the United States chairs the Center's Board, which also includes the director of the Administrative Office of the U.S. Courts and seven judges elected by the Judicial Conference.

The Director's Office is responsible for the Center's overall management and its relations with other organizations. Its Systems Innovation & Development Office provides technical support for Center education and research. Communications Policy & Design edits, produces, and distributes all Center print and electronic publications, operates the Federal Judicial Television Network, and through the Information Services Office maintains a specialized library collection of materials on judicial administration.

The Education Division plans and produces educational programs, services, and resources for judges and for nonjudicial court personnel, such as those in clerk's offices and probation and pretrial services offices. Its products include travel-based and in-court programs that participants attend in person, Web-based programs and publications, television programs broadcast by satellite, and manuals, monographs, and other print publications.

The Research Division undertakes empirical and exploratory research on federal judicial processes, court management, and sentencing and its consequences, often at the request of the Judicial Conference and its committees, the courts themselves, or other groups in the federal system.

The Federal Judicial History Office develops programs relating to the history of the judicial branch and assists courts with their own judicial history programs.

The Interjudicial Affairs Office provides information about judicial improvement to judges and others from foreign countries and identifies international legal developments of importance to personnel of the federal courts.